

# **EXHIBIT 5**

D177GARS

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

87 Cr. 860

5 ISIDORO GARBARINO,

6 Defendant.

7 -----x

8 January 7, 2013  
9 10:45 a.m.

10 Before:

11 HON. KEVIN THOMAS DUFFY

District Judge

12  
13 APPEARANCES

14 PREET BHARARA

United States Attorney for the  
Southern District of New York

15 BY: EDWARD DISKANT

16 Assistant United States Attorney

17 MARC GREENWALD

PETER TRUEBNER

18 Attorneys for Defendant

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1 (Case called)

2 (In open court)

3 THE COURT: All right. Be seated, please. Has the  
4 government received the presentence report?

5 MR. DISKANT: Yes, your Honor.

6 THE COURT: Any objections to it?

7 MR. DISKANT: Yes, your Honor. As noted in our  
8 submission --

9 THE COURT: I read that. Anything else?

10 MR. DISKANT: No, your Honor.

11 THE COURT: OK. The defendant apparently is having  
12 difficulty hearing me. He is not the only one. The court  
13 reporter has the same difficulty.

14 Can you hear me now? OK.

15 Counsel for the defense, have you received the  
16 presentence report?

17 MR. GREENWALD: Yes, your Honor.

18 THE COURT: Any objections other than those listed in  
19 your submission?

20 MR. GREENWALD: No, Judge. And the only one that's  
21 important to make a correction on the PSR would be the date of  
22 Mr. Garbarino's federal custody which began September 10.

23 THE COURT: Is that true, is it September 10?

24 MR. DISKANT: I believe so, yes, your Honor.

25 THE COURT: OK, fine. All right. So we will change

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1 he was in Italy he engaged Mr. Truebner.

2 THE COURT: All right. Sentencing anybody at any time  
3 is a particularly difficult balancing operation where the only  
4 person who thinks at the end of it he got it right is the  
5 judge, because everybody else has a complaint one way or the  
6 other.

7 It is not unusual, therefore, that nobody wants to  
8 start, but I'm doing the job, and everybody likes to get an  
9 easy way out, such as the sentencing guidelines. The problem  
10 with the sentencing guidelines is they sentence people on the  
11 basis of the crime. Let the punishment fit the crime is  
12 something from one of the Gilbert and Sullivan operettas.  
13 Anyway, I always felt it was wrong. I still feel it's wrong.  
14 I don't believe you can make anything fit a human being unless  
15 you deal with the human being first and last. So, my feelings  
16 about the sentencing guidelines I hope are pretty well known to  
17 everybody and are spelled out once again in this.

18 You look for a punishment which will basically be a  
19 fair and just punishment all the way around to both society and  
20 to the defendant and to the victims. Here basically we have a  
21 victimless crime, unless you want to make the United States in  
22 and of itself a victim, but they are a victim in every case, so  
23 we don't have a victim situation.

24 MR. DISKANT: Your Honor, if I may, there were in fact  
25 a number of victims. The international customers of the

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1 defendants were victims.

2 THE COURT: The international customers had low grade  
3 caviar instead of high grade caviar. I understand that, and I  
4 don't consider that to be a victim situation.

5 What you have charged him with is customs violations,  
6 not alteration or some kind of putting adulterates in the  
7 bottle. You charged him with customs violations, not with  
8 federal or Food & Drug Administration problems. So, how do you  
9 get out of that?

10 MR. DISKANT: Your Honor, we did actually charge him  
11 with mail fraud, because his victims were paying for caviar  
12 they were not receiving.

13 THE COURT: Well, I still don't see it. I'm sorry. I  
14 would assume that your victims or the people you think are  
15 victims have made it through or at least did not die in 1985,  
16 or '86. It's a long time ago, 20 some odd years ago.

17 Anyway, the case is old, but more importantly the  
18 defendant is old. I know what old means perhaps much more than  
19 anybody else in the courtroom.

20 Anyway, there is a fine here which is \$5,000 on each  
21 count. There are two counts; there is going to be a fine  
22 imposed of \$10,000.

23 The sentence of incarceration is going to be time  
24 served. And a special assessment must be made of \$100.

25 Now, the punishment lies not only in that but in the

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1 shame that Isidoro Garbarino brought to himself and more  
2 importantly to his family. The folks up in Connecticut are  
3 suffering now and will continue to suffer from this, and there  
4 is no one to blame except Mr. Garbarino. So, for the rest of  
5 his life he will have to face up to the fact that if he ever  
6 has grandchildren they will be the ones who say, oh, yes, my  
7 grandfather, the felon.

8 I realize a lot of people can disagree with my  
9 sentence, but in this case it is my sentence and not theirs,  
10 and in this case I believe this is the appropriate sentence.

11 You got a break. God forbid you should ever screw up  
12 again. Can you hear me?

13 THE DEFENDANT: Your Honor, I promise you with my  
14 hand --

15 THE COURT: You promised to obey the law a long time  
16 ago, and you didn't.

17 THE DEFENDANT: I promise, your Honor.

18 THE COURT: Don't promise me. There are two people  
19 out in the back -- I don't know who they are; it doesn't  
20 matter -- promise them.

21 THE DEFENDANT: I promise my children.

22 THE COURT: All right. Is there anything left?

23 MR. DISKANT: Your Honor, the government would move to  
24 dismiss all remaining open counts pending against the  
25 defendant.

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1 THE COURT: OK, no objection I assume.

2 MR. GREENWALD: No objection and nothing further from  
3 the defendant.

4 THE COURT: If you objected, I would have had you  
5 committed. All right.

6 Marshal, you need a thing for the cell block?

7 MARSHAL: Yes.

8 MR. DISKANT: Your Honor, I'm not sure the defendant  
9 can actually be released. I mean he will be turned over.

10 THE COURT: I know, but they are still going to have  
11 to. I assume you will be out of here immediately. You know,  
12 they have a detainer on him, right, ICE does? OK. So, make  
13 sure he pays his way out.

14 MR. GREENWALD: He is ready to buy his ticket and  
15 return to Italy.

16 THE COURT: Maybe he will have to buy two tickets; the  
17 marshal will go with him. Do I have a volunteer in that? All  
18 right.

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